No. 295

In the Supreme Court of the United States

OCTOBER TERM, 1950

COLONEL HENRY S. ROBERTSON, PRESIDENT, ARMY REVIEW BOARD, PETITIONER

v.

ROBERT H. CHAMBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 19) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 22-28) is reported at 183 F. 2d 144.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1950 (R. 29). The petition for a writ of certiorari was filed on September 8, 1950 and granted on November 27, 1950. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The Army Disability Review Board, in reviewing *de novo* an officer's discharge for physical

disability without pay, deemed it necessary to consider certain post-discharge Veterans' Administration medical examination reports on that officer.

The ultimate question is whether a court may prohibit the Review Board from considering the Veterans' Administration reports, even though the officer was given full opportunity to examine them. The subsidiary questions are whether (a) Section 302 of the Servicemen's Readjustment Act prohibits consideration of such reports, (b) mandamus is properly issuable, and (c) respondent has exhausted his administrative remedy.

STATUTES INVOLVED

1. Sections 302(a) and (b) of the Servicemen's Readjustment Act of 1944, 58 Stat. 287, as amended, 59 Stat. 623 (38 U. S. C. 693i (a) and (b)), which authorized the creation of the Army Disability Review Board and defined its duties and powers, provide as follows:

> (a) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board,

board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after [June 22, 1944], whichever is the later.

2. The powers of the Army Retiring Board, "the board whose findings and decision are being reviewed" in this case, and which are specifically vested in the Army Disability Review Board by

Section 302(a), *supra*, are set forth in R. S. 1248 (10 U. S. C. 963):

> A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose.

STATEMENT

On October 2, 1942, respondent Robert H. Chambers, then an Army captain, was honorably discharged, for physical disability and without retirement pay, as the result of the decision of an Army Retiring Board (R. 4). After the passage of Section 302 of the Servicemen's Readjustment Act of 1944, *supra*, pp. 2-3, respondent applied to the Army Disability Review Board for review of his discharge without pay (R. 4). The Review Board held a hearing at which, as respondent has frankly conceded, the "record presented to the Board was in accordance with the terms" of Section 302 (R. 4). On June 11, 1945, the Review Board reversed in part and affirmed in part the findings of the Retiring Board (R. 4).[1]

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[1] The record does not disclose the nature of this partial reversal and affirmance. However, in view of the respondent's subsequent petition to the Review Board for a reconsideration and rehearing of his application for review, it is evident that the Review Board's affirmance included an affirmance of the Retiring Board's determination that respondent was incapacitated for active military service but that his inca-

Respondent's request for a rehearing was granted by the Review Board on May 19, 1947 (R. 4). He was also notified, 30 days in advance, that the rehearing would take place on October 10, 1947 (R. 4). Prior to that date and "for the purpose of reviewing the record and preparing for the rehearing," respondent and his counsel "went to the Pentagon to the offices of the Army Disability Review Board" where they were afforded access to the entire record to be considered by the Review Board at the rehearing (R. 4). Upon examining this record, they ascertained that it contained certain Veterans' Administration reports on medical examinations of respondent in 1944 (R. 5, 8).[2] Respondent requested the Board

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pacity was not the result of an incident of service. In these circumstances, respondent, unlike an officer whose incapacity resulted from his service, is not placed on the retired list and is not entitled to retirement pay, which has normally been 75% of the pay of the rank held upon retirement. See R. S. 1251, 1252, 1274; 10 U.S.C. 933, 934, 971. The Career Compensation Act, which established a new retirement system for members of the armed forces effective October 1, 1949, also allows retirement pay only for service-incurred incapacity. (37 U.S.C., Supp. III, 271-284).

For general discussions of retirement pay, see Fitzgibbons, *Disability Benefits for Discharged Soldiers—Law, Regulation and Procedure* (1945), 31 Iowa L. Rev. 1, 22-35, and Kimbrough and Glen, *American Law of Veterans* (1946), ch. XIV (and 1949 Supplement).

[2] These reports had evidently not been brought to the Review Board's attention during its initial consideration of respondent's appeal from the decision of the Retiring Board. They were apparently "added to his file" prior to the scheduled rehearing (R. 8).

to remove those medical reports from the record, contending that Section 302 precluded the Review Board from considering any evidence other than his "service records" and such evidence as he may wish to submit (R. 8, 9). This request was denied because the broad powers vested in the Review Board by Section 302 were viewed as authorizing it to consider evidence obtained by it, on its own motion, from the Veterans' Administration (R. 10). The rehearing was twice delayed at respondent's request and finally rescheduled for April 6, 1948 (R. 5).

On March 29, 1948, a week before the rescheduled rehearing, respondent instituted this mandamus proceeding (R. 2) in the District Court of the United States for the District of Columbia, against the President of the Review Board, petitioner herein,[3] seeking a mandatory injunction directing that official to exclude the Veterans' Administration medical reports from the record and "to restrict such record to [respondent's] service records and documents submitted by [respondent] as evidence" (R. 2-6). Because of this action, the Board has not yet held the rehearing (R. 23).

[3] Suit was originally filed against Brigadier General Danforth in "his official capacity" as President of the Army Review Board (R. 2). On April 3, 1950, Colonel Robertson, the petitioner herein and the present President of the Board, was substituted on respondent's motion in the court of appeals (R. 21-22).

The complaint, together with its exhibits, set forth the facts as stated above. Petitioner moved to dismiss, and the case was heard and argued on this motion (R. 17-18). The district court, sustaining the motion, ordered the complaint dismissed on the grounds (1) that mandamus would not lie to control the admissibility of evidence by an administrative board and (2) that the action was brought before respondent exhausted his administrative remedy (R. 19).

On appeal, the court of appeals reversed, holding, in accordance with respondent's complaint, that Section 302 prohibits Review Board consideration of the Veterans' Administration reports (R. 27). The court also ruled that the suit was not dependent upon completion of the Review Board's rehearing (R. 24-26). It accordingly directed the district court "to enter judgment requiring the Board to withdraw the Veterans' Administration reports from the record before it" (R. 28).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that the Army Disability Review Board did not have the power, under Section 302 of the Servicemen's Readjustment Act, to add Veterans' Administration reports, made after respondent's discharge from military service, to the record to be considered by the Board.

2. In holding that process in the nature of mandamus would lie to compel the Board to ex-

clude Veterans' Administration records from the record before the Board.

3. In holding that respondent had exhausted his administrative remedy and the action was not premature.

4. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

The court of appeals and respondent rest their view that a Disability Review Board, reviewing the decision of a retiring board under Section 302 of the Servicemen's Readjustment Act of 1944, *supra*, pp. 2-3, cannot consider post-discharge Veterans' Administration medical reports, almost wholly on one sentence of that section: "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." That this sentence does not proscribe the disputed reports is shown by its terms and the terms of the whole section, by the section's legislative history, and by the consistent administrative practice since the statute's enactment.[3]

A. Even if the critical sentence be held to delimit the types of evidence which the review board may consider, the Veterans' Administration re-

[3] It is admitted that respondent and his counsel have been given full access to the medical reports in question (R. 4-5).

ports are included. For "all available service records" is equivalent to "all available records of the service department" relating to the individual, and Veterans' Administration reports, which have been officially transmitted to, and included in, the Army Department's files, have become "available records" of the latter agency, in the normal meaning of those words.

Properly read, however, the sentence attempts not to restrict the evidence which the Review Board *may* consider, but only to prescribe the minimum which it *must* take into account. Even apart from the rest of Section 302, it is textually permissible to construe "shall be based upon" as "shall start or commence from," so that the sentence's requirement would simply be that the board's rehearing or reconsideration was to start or commence from "all available service records" (however that term be interpreted), plus the evidence proffered by the applicant.

This is, indeed, the reading compelled by the remainder of Section 302, which plainly indicates that the review board is to make a *de novo* determination of disability-incident-to-service, as a result of a consideration of all available pertinent evidence. In particular, the section expressly endows the review board with all the powers of the boards whose decisions it reviews—the retiring boards. Retiring boards have long had broad powers to "inquire into and determine the facts touching the nature and occasion of the disability," including

the powers of a court-martial and a court of inquiry. (R. S. 1248, *supra,* p. 4.) These powers have traditionally been exercised to investigate into all relevant data and to secure full disclosure of the pertinent facts. Congress plainly intended the review board to have at least as broad powers of inquiry as the boards whose decisions it is regularly called upon to revise or confirm.

Moreover, post-discharge or post-retirement evidence is decidedly germane to the issue of permanence of disability, a question upon which review boards must rule in every case before ordering retirement with pay. In this connection, the extremely long statute of limitations contained in Section 302, permitting review fifteen or more years after retirement or discharge, is significant. Where any substantial time has elapsed since discharge or retirement, no intelligent decision can be made on the issue of permanence of disability without consideration of the applicant's subsequent medical history. It is undisputed that the officer is free to introduce such evidence if it is favorable to his claim, and there is no reason why like evidence should arbitrarily be barred where it is unfavorable.

B. The history of Section 302, which was a part of the "G. I. Bill of Rights," confirms this conclusion. The companion Section 301, establishing general discharge review boards to review the nature and type of all kinds of discharges, contains a provision substantially identical to the sentence in

Section 302 on which the court below relies, and, yet, the legislative history clearly shows that these boards, far from being confined to technical "service records" and the veteran's evidence, were to obtain as complete a picture as possible of all the true facts and circumstances. The history also demonstrates that Section 302 disability review boards, here involved, are twins of the Section 301 boards, and were intended to have comparable powers and duties of inquiry and investigation.

C. The consistent administrative interpretation by the service departments has been in accord, since shortly after the statute was passed. Congress, which has amended Section 302 in other respects, appears to have acquiesced in this construction.

II

Even if Section 302 be construed to prevent the review board from initially considering Veterans' Administration reports, that limitation should not be applied to a review board rehearing of its own adverse decision, since such a rehearing is a matter of administrative grace. In the present case, it is admitted that on the hearing required by the statute the disputed reports were not considered, and it is only in connection with the discretionary rehearing that they are to be included in the file.

III

Since the review board's construction of the statute is, at the very least, a reasonable one, the

established rules governing mandamus, particularly as to military matters, bar that remedy here. *Wilbur* v. *United States,* 281 U.S. 206, 219. These traditional rules have not been changed by the Administrative Procedure Act.

IV

Respondent brought this suit before the rehearing which he sought had been held. He has, therefore, not exhausted his administrative remedy, and judicial intervention is premature, regardless of whether or not he might ultimately obtain review of a final adverse decision on its merits.

ARGUMENT

Section 302(a) of the Servicemen's Readjustment Act of June 22, 1944, (the "G. I. Bill of Rights"), directs the armed services to establish Boards of Review and empowers those Boards to review decisions of retiring boards which have released officers for physical disability without pay. If a retiring board has decided that an officer is incapacitated for military duty and that his incapacity for military duty was not the result of an incident of his military service—circumstances which warrant retirement for physical disability without retirement pay [4]—the officer affected by the retiring board's decision is entitled to administrative review by a Section 302 Review Board. *Supra,* pp. 2-3.

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[4] See footnote 1, *supra,* pp. 4-5.

Respondent Chambers sought such a review of a retiring board's decision releasing him from service, in 1942, for physical disability without pay, but he contends in this suit that the record before the Review Board may not contain Veterans' Administration reports on medical examinations given him after his discharge, even though he has examined the reports and was offered full opportunity to rebut their contents. He does not contend that these reports are not pertinent or are irrelevant in the evidentiary sense. His exclusive reliance is Section 302's provision that "review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer," *supra*, p. 3, which he reads as flatly barring these reports, regardless of their evidentiary value.

The principal question for decision is whether this language in Section 302 prohibits the Review Board from considering the post-discharge Veterans' Administration medical reports concerning the officer invoking its review authority. It is our position that that portion of Section 302(a) cannot be stretched so as to justify such a prohibition. To the contrary, we believe that the full wording of the section—taken together with its purpose, its legislative history, and the functions vested in the Review Board—require the conclusion that Congress never intended to force the Board to blind

itself to Veterans' Administration reports or other material evidence.

Even if any other conclusion is permissible, this question of statutory interpretation, not being free from doubt, calls for the exercise by the Board of the type of discretion and judgment which is not controllable by mandamus. Moreover, since the Board rehearing, in connection with which respondent seeks to exclude the Veterans' Administration reports, has not yet been held, it is apparent that he is not entitled to judicial relief for his supposed or threatened injury until the prescribed administrative remedy has been exhausted.

I

Section 302 of the Servicemen's Readjustment Act of 1944 does not prohibit Army Disability Review Boards from considering post-discharge Veterans' Administration medical reports

A. *The Terms of Section 302 Show that Veterans' Administration Reports May Properly Be Considered.*

The court of appeals premised its holding that Veterans' Administration records may not be considered by the Disability Review Board on the view that the only "vital expression" in Section 302 is the sentence stating that "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer" (R. 27). Viewing these words as "words of exclusion of all evidence not specified in that sentence"

(R. 27), the court ruled that the Review Board was prohibited from considering any evidence other than (1) available "service records" or (2) evidence presented by the discharge officer. Since the Veterans' Administration medical reports were assumed not to be service records, and obviously did not fall within the second category, their consideration by the Review Board would, in the opinion of the court, have violated Section 302. The same argument is made by respondent (Br. in Opp., pp. 5-8).

1. It may be noted initially that the assumption that the Veterans' Administration records were not "service records", within the meaning of Section 302, is very questionable.[5] The term "service

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[5] In the court below, the Government did not argue that the reports were included within the term "service records", and may have conceded that they were not (R. 24-5). Nevertheless, we make the contention in this Court, if it is open to us to do so, because, in addition to this particular case, the decision here will probably govern all future proceedings of Disability Review Boards and probably also of the general Discharge Review Boards (operating under the companion Section 301). Cf. *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 281, 289.

Despite an intimation in the court of appeals' opinion (R. 24-5), the fact that this case is to be determined on a motion to dismiss is no obstacle to the presentation of this argument. The Government's motion did not admit the legal conclusion in the complaint (and its exhibits) that the Veterans' Administration medical reports were not "service records", within the meaning of Section 302. Cf. *Nortz* v. *United States*, 294 U.S. 317, 324-5; *Newport News Co.* v. *Schauffler*, 303 U.S. 54, 57.

records" includes all records of the particular service department to which the retired officer belonged and which concern him. This is made clear by the language used in the preceding Section 301 of the Act, which created the general Discharge Review Boards (established to review discharges of all types, see *infra,* pp. 27-36). Instead of simply using the term "service records," Section 301 spells out the thought intended to be conveyed by that term by referring to "all available records of the service department relating to the person requesting such review" (58 Stat. 286, 38 U.S.C. 693h). *Infra,* p. 28. Although the language is somewhat different, there is no reason to believe that a difference in meaning was intended, and the history of Sections 301 and 302, discussed below (at pp. 27 *et seq.*), confirms the equivalence of the two expressions.

Of course, the Veterans' Administration medical reports here involved were compiled by officials and employees of the Veterans' Administration. But once such official government reports were transmitted to the Army and incorporated into that Department's files, it would be hard to deny that they became official records of the Army Department (as well as of the Veterans Administration), and hence "service records" within the meaning of Section 302. [6]

[6] Since "service records" include all records of the service department to which the retired officer belonged and which concern him, they necessarily include all such records whether

2. In any event, if the term "service records" is not broad enough to include Veterans' Administration reports, we submit that reading the sentence relied on by the court below in the context of the whole of Section 302 shows that it simply means that the Review Board must, at the least, consider available "service records" and the officer's evidence. It does not mean that that evidence is the *only* evidence which the Board may consider.

a. Even if it is read literally and in isolation from the rest of the section, the sentence which the court of appeals finds critical [7] does not "plainly carry and require the meaning" the court finds there (R. 27). The sentence obviously speaks of "review" in the sense of "reconsideration" or "rehearing", and the succeeding phrase, "shall be based upon", may quite properly be construed—to use one of the common dictionary meanings of "base"—as "shall commence or start from". In other words, the Disability Board's reconsider-

compiled before or after the officer's discharge. A particular record does not fall out of the class of "all available records of the service department" "relating to" the officer requesting the review because it was made or received after he had left the service. There is therefore no merit to respondent's textual contention that "service records" must refer only to pre-discharge records (Brief in Opp., p. 8). Moreover, the fact that the officer can compel the Board to consider post-discharge data in his favor tends to show that the Board is not limited to pre-discharge "service records". See *infra*, pp. 24-25.

[7] "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

ation of the retiring board's decision is to *start* from, or *commence* with, the available "service records" and the evidence presented by the officer, but it is not necessarily to end or conclude there; other evidence may be considered if appropriate or desirable. "Service records" and the officer's evidence form the minimum materials to be considered, but not the maximum.

This reading of the bare words "shall be based upon" as "shall start or commence from"—rather than as "shall be founded upon", in the way the court below does (R. 27)—is certainly a permissible one, at the least; it is textually confirmed by the fact that the statute says that the Board's *"review"*, and not the Board's *"decision"* (a term also used in Section 302), "shall be based upon" the specified evidence.

b. Once Section 302 is read as a whole, there need be no doubt that Congress fully endowed the Army Disability Review Board with authority to consider all relevant information and evidence. Full-scale, unbiased review and reconsideration is obviously contemplated. The "findings" and "decisions" of the retiring boards are to be reviewed, and their decisions may be affirmed or reversed, but the reconsideration is not confined to the evidence before the prior board. New evidence may be introduced, through witnesses or in document form, and the officer may appear. The crucial issue is whether the officer should have been retired with-

out pay, and if the reviewing board cannot ascertain all the available facts as to the extent of the officer's incapacity and whether that incapacity resulted from his military service, it cannot be expected to decide that issue intelligently.

(1) Most significant is the provision giving the Review Board "the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed"—the army retiring boards. The plenary power of a retiring board to obtain all information pertinent to its inquiry appears clearly from its authority, as well as from the procedure it has developed (under that authority) to elicit all data which might be of value in disclosing the true nature of the officer's disability and its cause. These broad powers of inquiry vested in the retiring boards undoubtedly give them access to Veterans Administration's reports or other medical data.

To enable the retiring board to determine whether an officer should be retired for disability with or without pay, it is granted express authority to "inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office." R. S. 1248, *supra*, p. 4. Whenever an officer is ordered before a retiring board, the Adjutant General is required to furnish for consideration by the board, "originals or certified copies of the complete medical history, and of

all other official records[8] affecting the health and physical condition of the officer." AR 605-250, dated March 28, 1944, par. 3a. Before the taking of any testimony, the recorder submits to the board, in open session, all papers pertaining to the case which have been received from the Adjutant General's office. *Id.* par. 23c(1). The officer appearing before the board and his counsel "have the right to inspect *all such papers* during the hearing, and, upon reasonable request, before the hearing." *Id.* par. 23c(1). At the beginning of the hearing, the officer ordered before the board is called to state under oath the nature and cause of any disability. The board and the recorder are authorized orally to "examine [the officer] at this time or later for the purpose of *making full discovery of all facts as to* his condition." *Id.* par. 21.

To facilitate this full discovery of all facts, the board is, by statute, also given "such powers of a court-martial and of a court of inquiry as may be necessary for that purpose." R. S. 1248, *supra*, p. ←4. Witnesses may thus be summoned and their attendance compelled. A. R. 605-250, par. 22. When testifying as a witness in his own behalf, the officer may be cross-examined as any other witness. He may introduce testimony of witnesses and may cross-examine witnesses examined by the board. He may also cross-examine the medical members of the board if they have taken part in his physical examination and have indicated an opinion as to

[8] All emphasis in this paragraph has been supplied.

his physical condition. *Id.* par. 22c.[9] In addition to its access to all necessary testimony, the court-martial powers vested in the retiring board means that it can compel the production of any books, records, and papers material to the physical and mental condition of the officer appearing before it. *Id.* par. 23a.[10]

Since all of these unrestricted fact-finding and investigatory powers of the retiring boards are expressly vested in Disability Review Boards by Section 302, the Review Board here was also unrestricted in its investigation. It was fully authorized by this grant of power to consider any relevant evidence or material, including the obviously relevant Veterans' Administration reports, in order to obtain a full disclosure of pertinent facts. To limit the Review Board's power to investigate and to consider all pertinent evidence is *pro tanto* to frustrate Congress' clear purpose

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[9] While evidence as to the physical condition of the officer before the retiring board will ordinarily be furnished otherwise than by the medical members of the board, such members are authorized by the regulations to make a physical examination of the officer and may testify before the board as to the result of such examination. AR. 605-250, par. 22e.

[10] As the Navy manual says of the comparable regulations governing Navy retiring boards—"The above powers and authority are given the board in order that it may determine the facts and reach a conclusion in the matter before it. The proceedings of a retiring board being in no sense a trial, the board may properly consider documents and testimony which would not be proper evidence before a court martial." *Naval Courts and Boards* (1937) sec. 959.

to give it powers at least as broad as those of the retiring boards—an aim which is shown not only by the positive directive that the reviewing tribunal is to have "the same powers as exercised by, or vested in" the retiring board, but also by the difficulty of attributing to Congress an intention to blind the appellate board to evidence of the type which the subordinate board, whose decision the former is reviewing, was entitled to consider.

(2) The extremely long statute of limitations allowed by Section 302 also attests to the inadvisability of precluding the Review Board from considering post-discharge Veterans' Administration reports or any other developments subsequent to the officer's retirement or discharge. Under Section 302(b), *supra*, p. 3, it is possible for an officer to seek review of an adverse retiring board decision within fifteen years after June 22, 1944 (the date of enactment of the Servicemen's Readjustment Act) or within fifteen years after the date of his retirement for disability, "whichever is the later." This means that regardless of how far back an officer was retired for disability he may ask for review by the Disability Review Board at any time before June 21, 1959.[11] For example, an officer

[11] The review benefits of the Section are in no way limited to veterans of World War II. The members of the House Committee on World War Veterans' Legislation stated that they wanted "to get in the [congressional] record the legislative intent on the part of the members of the committee" to the effect that the Section "covers veterans" of all other wars as well. 90 Cong. Rec. 4541.

retired in 1909, at the age of 25, could, in 1959, 50 years later, ask for review of the retiring board decision which released him from the service without pay. If the Review Board, in such a case, should determine that the retiring board decision was improper and that the officer should be placed on the retired list with pay, he might well be entitled to recover from the Government either the active service pay or the retirement pay he would have earned during that fifty-year period. See *Womer* v. *United States,* 114 C. Cl. 415, 422.

This large contingent liability to which the Government is exposed under Section 302 makes the need for full ascertainment of all the true facts even more imperative. And, very frequently, evidence available only after the officer's retirement is the best key to proper evaluation of his physical and mental condition. Where a long period of time has elapsed between retirement and review, such evidence may be the only evidence which can cast light on the officer's disability. Post-discharge or post-retirement evidence may show that a disability thought by the retiring board to be functional or slight was in fact organic and serious. On the other hand, it may show that the retiring board mistakenly considered a slight disability to be serious. Likewise, it may show that a disability which the retiring board viewed as temporary was, in fact, temporary, or that the retiring board was mistaken and that the disability was actually permanent. Indeed, the best possible evidence as to

the permanency of the disability—a question on which the Review Board is compelled to rule in every case in which retirement with pay is ordered—is evidence as to whether the disability has continued or proven permanent since the officer's discharge. Whenever permanency of disability as of a particular date is an issue, it is settled that evidence or proof of subsequent events is germane and admissible. *Lumbra* v. *United States,* 290 U.S. 551, 560; *United States* v. *Spaulding,* 293 U.S. 498, 500, rehearing denied, 294 U.S. 731. There is no doubt that Section 302 would allow respondent to introduce such evidence whenever it was favorable to him, and would also require the Review Board to consider it on the ground that it was "other evidence as may be presented by [the] officer." Section 302(a), *supra,* p. 3. Nevertheless, respondent appears to argue that if the evidence does not favor him but tends to confirm the view of the retiring board, it may not be considered by the Review Board.[12] Fairness of decision militates

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[12] Respondent is plainly wrong in the contention that the review board must "place itself as nearly as possible in the position of the retiring board whose action it is to review" (Br. in Opp., p. 8). If that had been the congressional purpose, the statute would have provided for a review solely of the evidence and information before the retiring board. But the scheme of Section 302 is to provide for a redetermination of the facts on a new or augmented record. New evidence may be offered, new witnesses heard, new documents submitted. As he all but admits (Br. in Opp., p. 8), respondent's real position is that the retired officer has full leeway to prove the original decision wrong by introducing new evidence, but

against this inconsistent position and demands that the evidence be wholly available to the Review Board, whether it favors the retired officer or the Government. There is no indication in the statute that Congress desired arbitrarily to weight the Board's reconsideration sharply on the officer's side, and no other reason can be given for handicapping the Government as severely as the court below has done.

3. One additional and extremely important factor should be noted. This is not a case where respondent seeks to exclude Review Board consideration of the Veterans' Administration reports on the ground that he has had no opportunity to examine or rebut the contents of those reports. Considerations of fairness often require that a party to an administrative proceeding be not adjudged on evidence undisclosed to him. A party to such a proceeding is usually fully apprised of the evidence submitted to, or to be considered by, the administrative agency, and given an opportunity to inspect documents and to offer evidence in explanation or rebuttal — whenever disclosure of the evidence to be considered by the administrative board is not prejudicial to the public interest. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U.S. 88, 93; *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274; *cf. Knauff* v. *Shaughnessy*, 338 U.S. 537.

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the Government is confined to upholding the decision on the retiring board's own record.

Whether or not these principles would necessarily govern a grant or review of what are really pension benefits, they are carried over into the Review Board's Standard Operating Procedure [13] which specifically provides that the discharged officer "and/or his counsel may inspect, at any suitable time prior to the hearing, any and all documents, files, records, or other evidence * * * which will be presented for consideration by the Review Board." [14] In order to refute, explain, or show possible inaccuracies in such evidence, the officer or "counsel of his own selection" are authorized to "appear before the review board in open session" and present testimony through any witnesses they choose "either in person or by affidavit." 32 CFR 581.1(b)(2)(i).

In view of these provisions, it is undeniable that complete opportunity was afforded the respondent to rebut the Veterans' Administration reports he sought to exclude from consideration. And respondent's complaint acknowledges that he and his counsel were given access to the entire record at the Pentagon Building "for the purpose of * * * preparing for the rehearing" (R. 4), and that the records so made available to them contained the

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[13] The same right of inspection and examination is also available, as has been noted, *supra*, p. 20, before the retiring board.

[14] See Army Disability Review Board SOP June 6, 1949 Annex A, Paragraph 15(a), superseding an earlier SOP, March 8, 1945, which contained an identical provision.

Veterans' Administration reports here challenged (R. 5, 8). In these circumstances, it is apparent that fairness to respondent does not require exclusion of the reports from consideration by the Review Board, but rather that their exclusion results in hampering proper and intelligent review.

B. *The History of Section 302 Confirms this Conclusion*

The history of Section 302, far from evincing any congressional intent to deny Review Boards access to Veterans' Administration, or similar, reports, discloses full congressional awareness of the need for empowering the Boards to consider all pertinent evidence. There is no indication of a design to restrict the reviewing tribunal's consideration to (a) materials already included in the service's files, plus (b) such evidence as the veteran might be willing to offer.

In tracing the development of Section 302,[15] the relevant history is largely that of its companion provision, Section 301, which authorized the creation of Discharge Review Boards to review the "type and nature" of any discharge or dismissal from the service, except one resulting from a gen-

[15] While other Titles of the Servicemen's Readjustment Act of 1944 ("G. I. Bill of Rights") conferred educational benefits, loan guarantee privileges, and unemployment pay benefits on ex-servicemen generally, Title I, in which Section 302 was included, was mainly focussed on assisting the disabled or disqualified veteran. 90 Cong. Rec. 4453, 4456.

eral court-martial sentence.[16] The history of Section 301 is directly pertinent for two important

[16] Section 301, 58 Stat. 286, as amended in 1946, 60 Stat. 932, 38 U.S.C. 693h, provides:

> The Secretary of War and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the War and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man or woman or, if deceased, by the surviving spouse, next of kin, or legal representative, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel: *Provided*, That the term "counsel" as used in this section shall be construed to include, among others, accredited representatives of veterans' organizations recognized by the Veterans' Administration under section 200 of the Act of June 29, 1936 (Public Law Numbered 844, Seventy-fourth Congress). Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are hereby amended to authorize the Secretary of War and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of War or the Secretary of the Navy, respectively: *Provided*,

reasons. First, as we have already pointed out (*supra*, pp. 15-16), Section 301 contains language almost identical to the sentence in Section 302 on which respondent relies.[17] In addition, as we show below, Section 302 was inserted at the last stage of legislative consideration merely in order to accede to demands for express and separate recognition of the claims of disabled officers retired without pay; in the earlier phases of the legislative process, Section 301 was deemed broad enough to

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That no request for review by such board of a discharge or dismissal under the provisions of this section shall be valid unless filed within fifteen years after such discharge or dismissal or within fifteen years after the effective date of this Act [June 22, 1944] whichever be the later: *And provided further*, That the authority conferred upon the Secretary of War and the Secretary of the Navy by this section shall vest in and be exercised by the Secretary of the Treasury, at such times as the Coast Guard is operating under the Treasury Department, with respect to the discharge or dismissal of former personnel of the Coast Guard, and that the findings of boards established pursuant to such authority shall be final subject only to review by the Secretary of the Treasury.

[The 1946 amendment added the provisions relating to the Coast Guard]

[17] As the preceding footnote indicates, Section 301 provides that review by Discharge Review Boards "shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person." 58 Stat. 286, 38 U. S. C. 693h. The comparable provision of Section 302 states that the "review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." *Supra*, p. 3.

authorize the Discharge Review Boards to reconsider decisions of retiring boards which had retired officers for physical incapacity but without pay—that is, the type of review specifically vested in the Disability Review Boards by Section 302 as enacted.

1. S. 1617, of the 78th Congress—the bill which evolved into S. 1767, which in turn became the Servicemen's Readjustment Act of 1944—was introduced on January 11, 1944, by Senator Clark, the chairman of the Subcommittee on Veterans' Legislation of the Senate Committee on Finance. 90 Cong. Rec. 30. On the House side, the companion measure, H. R. 3917, was introduced on January 10, 1944, by Representative Rankin, chairman of the Committee on World War Veterans' Legislation. 90 Cong. Rec. 24. Each of these bills contained a broadly phrased Section 301 providing for review of the "type" and "nature" of any former officer's or soldier's "discharge or release from active duty," and clearly encompassing cases involving retirement or release from active duty without pay for physical disability. Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917, p. 3.[18]

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[18] Section 301, in these bills, provided:

> SEC. 301. The Administrator of Veterans' Affairs is hereby authorized and directed to confer with the Secretary of War and the Secretary of the Navy for the purpose of establishing boards of review in the War and Navy Departments composed of five members each whose duties shall be to review, upon the request of

The debates and hearings on these measures, and their successor bills, leave no doubt as to the predominant purpose of the review of discharges, dismissals, and retirements sought to be established by this Section 301. The pressures of rapid demobilization had resulted in injustices to many soldiers through the improper issuance to them "in haste" of dishonorable or "bad conduct" or "blue" or "without honor" discharges, when honorable discharges should have been awarded. Hearings before the Subcommittee on Veterans' Legislation of the Senate Committee on Finance, 78th Cong., 2d Sess., on S. 1617, p. 83.[19] The veteran might be interested

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a former officer or enlisted man or woman, the type and nature of his or her discharge or release from active duty. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel: *Provided,* That the term "counsel" as used in this section shall be construed to include, among others, accredited representatives of veterans' organizations recognized by the Veterans' Administration under section 200 of the Act of June 29, 1936, Public Law Numbered 844, Seventy-fourth Congress. Such board shall have authority to change, correct, or modify any discharge or release from active duty in accord with the facts presented to the board.

[See Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H.R. 3917 and S. 1767, p. 3.]

[19] In general, the Army (including the Army Air Forces) issued the following types of discharges to enlisted personnel

in having such a discharge corrected only as a matter of personal pride and for purposes of removing the stigma attaching to a non-honorable discharge. But, in view of the generous and comprehensive statutory scheme of veterans' disability benefits,[20] together with the mass of federal and

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during and preceding World War II: (a) the honorable or white discharge; (b) the dishonorable or yellow discharge, issued only by sentence of a general court-martial; and (c) the discharge without honor or blue discharge, issued where service was not honest and faithful or where character was less than "good"; it is neither honorable nor dishonorable. Separations and dismissals of officers fell into the same general categories. See Sen. Doc. 152, 78th Cong., 2d Sess. ("Manual explanatory of the privileges, rights, and benefits provided for all persons who are, or have been, members of the armed forces of the United States and of those dependent upon them"), at pp. 49-51; Kimbrough and Glen, *American Law of Veterans* (1946), sec. 191, pp. 136-138; Fitzgibbons, *Disability Benefits for Discharged Soldiers—Law, Regulation and Procedure* (1945), 31 Iowa L. Rev. 1, 16-17.

The Navy and Coast Guard had the following types of discharge: (a) honorable, (b) under honorable or satisfactory conditions, and (c) unfavorable, including dishonorable (pursuant to sentence of a general court-martial), bad conduct (by sentence of a summary or general court-martial), undesirable, and unfitness discharges. The Marine Corps issued (a) honorable discharges, (b) simple discharges, including some types of discharges for undesirability, (c) bad-conduct discharges by sentence of summary or general court-martial, and (d) dishonorable discharges, pursuant to sentence of a general court-martial. See Sen. Doc. 152, *supra*, at pp. 51-3; Kimbrough and Glen, *op. cit., supra*, secs. 192-193, pp. 137-140.

[20] The statutory benefits available for compensating soldiers for disability incurred incident to service are, together with a vast number of other statutes conferring additional benefits on veterans, codified in Title 38, U.S.C. (Pensions, Bonuses, and Veterans' Relief). In addition, Title 10 (Army),

state legislation granting other substantial benefits and preferences to the ex-serviceman, [21] it was also

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Title 34 (Navy), Title 37 (Pay and allowances of Army, Navy, Marine Corps, Coast Guard) contain many other statutes on military benefits and perquisites. In addition to retirement pay, which is generally available only to officers and enlisted personnel with long service, the principal types of disability benefits are:

a. Monthly pension payments are provided by law in respect of those servicemen who have incurred partial or total disabling injuries as a result of their military service (Act of March 20, 1933, Sec. 1 (a), 48 Stat. 8, 38 U. S. C. 701 (a); Act of July 13, 1943, 57 Stat. 554; Act of October 10, 1949, Public Law 339, 81st Cong., 1st sess.). The amount of the disability pension depends, of course, on the degree of disability, and may be as high as $300 per month (Act of September 20, 1945, 59 Stat. 533, 534, amending Vet. Reg. No. 1 (a), part I, paragraph II (o)). A disability pension continues to be paid until the serviceman's death or until the disability has ceased. Where, after a pension award has been made, the disability is shown to have increased, commensurate increases in the pension will be made (Act of June 21, 1879, 21 Stat. 30, as amended, 38 U. S. C. 57). Moreover, under the Acts of July 2, 1948 and October 10, 1949, veterans with a disability of 50 percent or more are entitled to additional payments ranging from $14 to $91 every month, based on their degree of disability and the number of their dependents. (62 Stat. 1219; Public Law 339, 81st Cong., 1st sess.)

b. Veterans are also entitled to additional hospitalization and medical care from the Veterans' Administration (Act of June 7, 1924, Sec. 10, 43 Stat. 610, as amended, 38 U.S.C. 434; Act of March 20, 1933, Sec. 6, 48 Stat. 9, 38 U. S. C. 706; 10 C. F. R. Cum. Supp. 77.2 (b) and 77.15 (b)).

c. The Act of June 27, 1944 (58 Stat. 388, 5 U. S. C.

clear that the interest of the veteran in correcting an improperly-issued non-honorable discharge might well go beyond merely clearing his name. For practically all such benefits are barred to veterans dishonorably discharged by general court-martial sentence,[22] most are withheld from veterans otherwise discharged "under dishonorable conditions,"[23] and several are barred to any veteran not affirma-

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852) gives special federal employment preference to veterans with service-connected disabilities.

d. Other statutes confer special farm loan and mortgage insurance privileges on veterans with pensionable disabilities so as to afford such veterans sufficient income which, together with their pensions, will enable them to meet living and operating expenses and the amounts due on their loans (Act of August 14, 1946, 60 Stat. 1073, 7 U. S. C. 1001 (c)).

[21] *E.g.*, the benefits of Title II (Education), Titles III (Loans), IV (Employment), and V (Unemployment Readjustment Allowances) of the Servicemen's Readjustment Act itself; the Veterans' Preference Act of 1944 and comparable state civil service laws; Section 8 of the Selective Training and Service Act of 1940; state bonus laws. For a collection and description of federal statutes conferring special rights and benefits on veterans and their dependents, see Kimbrough and Glen, and Sen. Doc. 152, 78th Cong., 2d sess., *op. cit., supra*, note 19. For a complete index and digest of benefits conferred by various state statutes, see State Veterans' Laws (79th Cong., 1st sess., House Committee Print No. 8).

[22] See, *e.g.*, Sec. 300 of the Servicemen's Readjustment Act of 1944, 38 U.S.C. 693g.

[23] See, *e.g.*, Secs. 500, 700, 1503 of the Servicemen's Readjustment Act of 1944, 38 U.S.C. 694, 696, 697c; Fitzgibbons, *op. cit., supra*, note 19, at 17-18; Kimbrough and Glen, *op. cit., supra*, note 19, Sec. 12, p. 10.

tively honorably discharged.[24] Large numbers of veterans would thus be precluded from obtaining certain of these benefits and privileges unless they succeeded in having their discharges or separations revised or reviewed. The Discharge Review Boards to be established under Section 301 were to afford such review.

Section 301, as it was originally introduced, contained the identical language now appearing in Section 301 of the 1944 Act, to the effect that "review shall be based upon all available records of the service department * * * and such other evidence as may be presented" by the person seeking review." Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917, p. 3; Hearings before the Subcommittee on Veterans' Legislation of the Senate Committee on Finance, 78th Cong., 2d Sess., on S. 1617, p. 191. See footnote 18, *supra,* pp. 30-31. That this language was not intended to preclude the Discharge Review Board from considering any pertinent evidence was demonstrated early in the Senate Subcommittee's hearings on S. 1617. In discussing the meaning and effect of the proposed Section 301, it was pointed out that what was being sought was "congressional approval" of a review procedure which would be "based upon all perti-

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[24] See, *e.g.*, Sec. 2 of the Veterans' Preference Act of 1944, 5 U.S.C. 851; Sec. 1 of the Mustering-Out Payment Act of 1944, 38 U.S.C. 691a; Sec. 8 of the Selective Training and Service Act of 1940, 50 U.S.C.App. 308(a); Kimbrough and Glen, *op. cit., supra,* note 19, Sec. 11, p. 9.

nent evidence."[25] Hearings before the Subcommittee on Veterans' Legislation of the Senate Committee on Finance, 78th Cong., 2d Sess., on S. 1617, p. 13. It was also emphasized that Section 301 authorized the Review Boards to act "in accord with the facts presented" to the Boards. Hearings before the Subcommittee on Veterans' Legislation of the Senate Committee on Finance, 78th Cong., 2d Sess., on S. 1617, p. 190. On the other hand, it is significant that there is not a single statement in any of the debates, hearings, or committee reports which supports respondent's suggestion that the Boards were to be limited only to technical "service records" and such evidence as the applicant-for-review introduced.

2. At the House hearings on the measure, it was frankly conceded by representatives of the War Department that the language of Section 301, as it appeared in S. 1617 and H. R. 3917, was broad enough to include review of "the case of an officer who comes before a retiring board, and that board finds that his disability is not incurred in the line of duty and he is discharged from the service." Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917, p. 197. Reasons similar to those

[25] This statement was made by Mr. Atherton, as the National Commander of the American Legion, which had been largely responsible for the introduction of S. 1617 and other bills which led to the 1944 G. I. Bill of Rights. See Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917 and S. 1767, pp. 29-30, p. 90, p. 122.

prompting the review of improperly issued non-honorable discharges suggest that it is desirable to give a disabled officer who has been erroneously retired without pay an opportunity to have his status corrected. The War Department, however, objected to this broad scope of Section 301 and suggested that the language be restricted "so that it does not provide for a review of proceedings in which an officer is retired or discharged without pay." Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917, p. 207.[26]

This War Department suggestion was adopted in S. 1767, which was introduced on March 13, 1944, by Senator Clark on behalf of himself and 80 other Senators (90 Cong. Rec. 2491), and which ultimately became the Servicemen's Readjustment Act of 1944. At that time, Senator Clark's subcommittee had completed its hearing on S. 1617, and it was decided to abandon S. 1617 in favor of S. 1767. *Idem.* Section 301 of S. 1767, in its original form, carried the same language and provisions appearing in Section 301 of the preceding bills

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[26] Representative Kearney, a member of the House Committee on World War Veterans' Legislation, stated, in connection with this War Department suggestion, that he was personally "going to insist" upon a provision for review of the retiring cases "when it comes to writing this bill." Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., on H. R. 3917, 2d Sess., p. 208. For Mr. Kearney's part in seeing that retired officers were clearly covered, see *infra*, pp. 40-41.

(H. R. 3917 and S. 1617), but specifically excepted from the Review Board's authority cases involving "denial [to officers] of retirement with pay." S. Rep. No. 755, 78th Cong., 2d Sess., p. 17.

The Senate Committee on Finance reported S. 1767 one week later, with an amendment which struck out that specific exception. S. Rep. No. 755, 78th Cong., 2d Sess., p. 17. This Committee amendment was agreed to on the floor of the Senate and Section 301, without any exception of cases involving denial of retirement pay, and in the general terms in which it had appeared in the earlier bills, was passed by the Senate along with the rest of the G. I. Bill. 90 Cong. Rec. 3081. While the bill in this form contained no Section 302, the Senate's adoption of the Committee amendment shows that Section 301 was viewed as affording review of decisions retiring officers without pay.

S. 1767 was then referred to the House Committee on World War Veterans' Legislation. 90 Cong. Rec. 3156. That Committee, which had theretofore been considering H. R. 3917, the earlier House measure equivalent to S. 1617, undertook the consideration of S. 1767, which it reported out with several amendments to Section 301 (H. Rep. No. 1418, 78th Cong., 2d Sess., pp. 1, 6). None of these amendments affected the presently pertinent language of the section or its coverage of cases involving denials of retirement with pay. 90 Cong.

Rec. 4332.[27] On the contrary, Representative Cunningham, a member of the Committee, referred to the broad scope of Section 301 and stated that "it was the thought of the committee * * * to cover all veterans" and that the only exception concerned "those who were dishonorably discharged as the result of a general court martial." 90 Cong. Rec. 4538. S. 1767 was passed by the House, on May 18, 1944, without any other changes made in Section 301. 90 Cong. Rec. 4678.

3. The Senate disagreed generally with House amendments to the bill and a conference was held. 90 Cong. Rec. 4698; 4769. The conference bill was submitted and agreed to in the Senate on June 12, 1944, and in the House on June 13, 1944. 90 Cong. Rec. 5752, 5760, 5841, 5853. The conference amended Section 301 so as to allow the Board to review discharges on its own motion, and changed the ten-year statute of limitations, suggested by the House, to fifteen years.

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[27] The House Committee also inserted a prohibition against review unless an application for review was filed within ten years after discharge or the date of the Act, whichever was later. 90 Cong. Rec. 4333. This statute of limitations was suggested by the War Department. Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917, p. 346.

Section 301, as it had originally been introduced in the earlier bills (see fn. 18, *supra*, pp. 30-31) permitted review even of dishonorable discharges ordered by a general court-martial, but such discharges were later specifically excluded, and section 301 of S. 1767, as it was introduced, contained this exclusion. See S. Rep. No. 755, 78th Cong., 2d sess., pp. 5, 17.

The conference also added the separate Section 302. In the words of the House managers, "the conference agreement also includes an additional section 302, authorizing *under similar conditions and limitations* [to those imposed in Section 301] the establishment of boards of review in cases of retirement of officers without pay because of physical disability." H. Rep. 1624, 78th Cong., 2d Sess., p. 20, 90 Cong. Rec. 5848 (italics supplied). Since, as we have shown, Section 301 as it passed both houses was admittedly broad enough to include these cases (*supra*, pp. 36-39), it seems evident, as suggested above (footnote 26, *supra*, p. 37), that Section 302 was added so as to satisfy Representative Kearney, who, out of an abundance of caution, insisted upon its insertion in conference.[28] Representative Cunningham, another member of the House Committee, in discussing the conference agreement, pointed out that the bill "as it came from conference is substantially the bill as it passed the House" and that "in title I [in which Sections 301 and 302 were included] there are no

[28] This is made clear by the history of the later Act of December 28, 1945 ("To amend the Servicemen's Readjustment Act of 1944, and for other purposes"), 59 Stat. 623, which shows that Mr. Kearney, in order to make absolutely certain that these retirement cases would be reviewed, offered Section 302 "as an amendment to the G. I. bill in the conference." Hearings before the House Committee on World War Veterans' Legislation, 79th Cong., 1st Sess., on H. R. 3749 [the bill which became the Act of December 28, 1945], p. 206. Mr. Kearney stated in the course of those hearings that he had "draw[n] up that amendment." *Id.*, p. 207.

material changes." 90 Cong. Rec. 5848. And the House manager's statement, quoted above, indicates that the sections were closely allied.[29]

4. The foregoing history shows that (a) Congress desired to afford veterans separated from the service under conditions which would affect their rights and privileges as ex-servicemen an opportunity to have their discharges or separations reviewed and revised; (b) the general discharge review boards established by Section 301 were to obtain as complete a picture as possible of the true facts and circumstances, and were not confined to technical "service records" and the veteran's evidence; (c) Section 302 boards, involved here, are cognate and twin to the Section 301 boards, perform the same function in the limited class of retirement cases, and were intended to have comparable powers and duties of inquiry and investigation.

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[29] It was probably thought unnecessary to include a similar provision for enlisted personnel because, with the exception of those with very long service, disabled enlisted men are taken care of by the pension system administered by the Veterans' Administration (which has established procedures for review of disability claims) rather than through retirement pay. Officers are the main beneficiaries of the retirement pay system administered by the armed services. See Fitzgibbons, *op. cit., supra*, fn. 19, at 2, 22-35; Kimbrough and Glen, *op. cit., supra*, fn. 19, ch. XIV; Sen. Doc. 152, 78th Cong., 2d *Sess., supra*, fn. 19, at 73 *et seq.* In general, a veteran cannot receive both a Veterans' Administration pension and the ordinary amount of retirement pay. Kimbrough and Glen, Secs. 712, 715, 800; Sen. Doc. 152, at p. 81.

Congress clearly intended to permit the general discharge boards established by Section 301 to consider "all pertinent evidence," *supra*, pp. 35-36, and these boards could certainly not fulfill their very important functions if they were limited in the way that respondent and the court below would restrict the Section 302 boards.[30] But the almost-identical wording and intimate historical alliance between the two sections prove that both have the same powers to receive and consider evidence. It follows that both must have authority to consider data comparable to the Veterans' Administration reports at issue here, or, if the lower court's view is accepted, that the much more significant Section 301 boards are seriously hobbled in their reviewing work — contrary to the plain legislative purpose and directive.

C. *The Administrative Construction of Section 302 Is in Accord*

1. *Consistent administrative practice:* Within three months after Section 302 took effect, the War Department, recognizing that intelligent review called for consideration by the Disability Review Boards of all available evidence, directed the Boards to consider "all available War Department and/or *other records* pertaining to the health and physical condition of the applicant" and to "examine all War Department records and all

[30] See the letter from the President of the Army Discharge Review Board (established under Section 301) quoted in footnote 32, *infra*, pp. 43-44.

available evidence, together with all contentions submitted on behalf of the applicant and evidence in support thereof" (WDGAP 334, Secretary of War's Disability Review Board, October 21, 1944, quoted in part in respondent's complaint, R. 3; italics added). The Army has followed that directive consistently and the current recodification of the Army regulations contain identical instructions. See 32 CFR 581.1(a)(2)(iii). Similar instructions govern operations of the Air Force Disability Review Board, 32 CFR 881.32(c) and the Navy Retiring Review Board, 32 CFR 722.3 (g), which were also established under Section 302.[31] The same procedure, in calling for Veterans' Administration reports and other pertinent evidence, is also followed by the general Army Discharge Review Board created under Section 301, from which (as we have seen) Section 302 was derived and which has language almost identical to that in Section 302. See *supra*, pp. 27 *et seq.*[32]

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[31] Veterans' Administration examination reports have accordingly been considered by the Review Boards whenever available. As of July 28, 1950, the Army Review Board had decided 3,261 cases. In many of these cases in which the Review Board authorized retirement pay benefits the Veterans' Administration reports constituted the basis for favorable action. They have, of course, likewise played an important part in many disallowed cases.

[32] In a letter dated December 28, 1950, the President of the Army Discharge Review Board advised the Solicitor General that:

> The Army Discharge Review Board established under

The rule is well-settled that consistent administrative construction of a statute, controlling the settlement of many cases,[33] is entitled to great weight and "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States* v. *Citizens Loan and Trust Company,* 316 U. S. 209, 214. This principle of deference to administrative construction has, of course, special applicability to legislation as relatively new as the Servicemen's Readjustment Act of 1944, for "administrative practice, consistent and generally unchallenged * * * has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Company* v. *United States,* 288 U. S. 294, 315; *United States* v. *American Trucking Ass'ns., Inc.,* 310 U. S. 534, 549;

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the provisions of Section 301, Public Law 346, 78th Congress, approved 22 June 1944 (38 USC 693h) does not base its decision on a review of Army records alone where other records are available. The board on numerous occasions has called for records and information from civilian hospitals, courts, institutions, Veterans Administration, etc. In fact it is the desire of the board to get a complete picture on the appellant in order that no injustice will be done in reaching a decision on whether or not his type of discharge should be changed.

[33] See footnotes 31 and 32, *supra.*

Adams v. *United States,* 319 U. S. 312, 314-315; *Edward's Lessee* v. *Darby,* 12 Wheat. 206, 210.

We have already shown that, at the very least, there is a thoroughly reasonable basis for the administrative construction placed on Section 302 (a). *Supra,* pp. 14-42. In fact, the instant case represents the first and only instance, among the thousands of cases reviewed by the Boards, in which the administrative construction has been challenged. Since that construction is not clearly wrong, the principle of deference to consistent administrative construction shows that the court below erred in ruling as it did.

2. *Legislative acquiescence in the administrative practice:* On December 28, 1945, more than fourteen months after this administrative construction had been formally announced by the War Department, Congress re-enacted Section 302, without any change here pertinent. The history of the bill which became the Act of December 28, 1945, suggests that this reenactment should be construed as acceptance and approval of the administrative practice.

a. H. R. 3749 was introduced in the 79th Congress, 1st Session, to remedy certain difficulties and inadequacies that had appeared in the course of the operation of the Servicemen's Readjustment Act of June 22, 1944. Hearings on the bill were held by the House Committee on World War Veterans' Legislation, in June and July 1945.

and by the Subcommittee on Veterans' Legislation of the Senate Committee on Finance, in October 1945.[34] In the House hearings, the veterans' organizations' representatives testified that "the provisions of title I [which includes Section 302] are working satisfactorily. We find very few complaints about any of the provisions in title I." P. 181. Other representatives, in answer to a question as to whether "the situation is working out all right" in cases coming before the Review Boards, stated that the "Board has been very fair. I think they are doing a splendid job." P. 196. Still another representative stated that "Title I has been working very well in most respects * * * particularly as to the reviewing authority as to discharge certificates and as to officers' retiring benefits." P. 213. The only amendment suggested in the House with respect to Section 302 was a language change which would make it clear that the Review Boards' authority extended to decisions of Boards of Medical Survey, the Navy counterpart of the Army Retiring Boards. Hearings before the House Committee on World War Veterans' Legislation, 79th Cong., 1st Sess., on H. R. 3749, pp. 207, 213. This clarifying amendment appeared in a House Committee amendment to H. R. 3749 when it was reported out to the House. See 91 Cong. Rec. 7719.

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[34] These committees, of course, had also considered the bills which led to the 1944 Act. See *supra*, pp. 30-31, 35-39.

In the hearings on the bill before the Senate Subcommittee, it was pointed out that apart from the loan and educational provisions, "the act seems to be working fairly well." P. 220. In the course of those hearings, additional language was added to make it clear that the Review Boards would have authority to review determinations of Disposition Boards as well as retiring boards and Boards of Medical Survey. P. 247. This additional language, adopted by the Senate Committee (91 Cong. Rec. 10499, 10503), was the only material change in Section 302 passed by the Senate.[35]

In conference, numerous changes were made with respect to other provisions of the bill and of the Servicemen's Readjustment Act of 1944. But Section 302(a) was not affected. The chairman of the House Committee on World War Veterans' Legislation and Representative Rogers who, along with the chairman, managed the bill for the House in conference, pointed out that the conference version simply "clarifies the intent [of the original act] by including findings and decisions of boards of medical survey and disposition boards." 91 Cong. Rec. 12373, 12377.

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[35] One other Senate language change broadened "the class of those who may apply [for review] to include any officer *released from active service.*" 91 Cong. Rec. 10503 (Italics supplied). Section 302, as passed in 1944, had applied to officers *released to inactive service* for physical disability without pay. 58 Stat. 287.

b. As this history proves, Title I, including Section 302, was deemed by the veterans' organizations — which are the informal watchdogs of the review boards and which were undoubtedly familiar with the fourteen-month-old administrative practice of considering all available evidence and records — to be fulfilling its purposes. In sharp contrast to the expressed dissatisfaction with the working of the educational and loan provisions of the 1944 Act, which led to numerous amendments to those sections, there was no intimation by the veterans' organizations or by the legislators that the review boards were acting improperly or that the scope of their review was too wide. In these circumstances, it is a reasonable inference that Congress accepted and acquiesced in the administrative practice. Cf. *United States* v. *Zazove*, 334 U.S. 602, 622-623; *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 500.

II

Even if Section 302 may be construed to prevent the Review Board from initially considering Veterans' Administration reports, that limitation should not be applied to a Review Board rehearing of its own decision adverse to the applicant

While we believe that Section 302 cannot be construed to prohibit the Disability Review Board from considering Veterans' Administration medical reports, it is appropriate to note that even if such a limitation is read into the Act, it should not affect what is involved here—a Review Board's

rehearing of its own decision adverse to the applicant. Such a limitation should apply, at most, only to the initial hearing referred to by Section 302.

Section 302 grants the retired officer a right to a review by the Disability Review Board of the adverse retiring board decision. Here, such a review was sought and, in accordance with the language of respondent's complaint, "a hearing was held pursuant to Section 302 of the said statute, and at said hearing the record presented to the Board was in accordance with the terms of the statute in that it consisted solely of the plaintiff's service records and evidence submitted by him" (R. 4). It is apparent, therefore, that as far as the hearing required by the statute is concerned, the record before the Disability Review Board was limited to the extent urged by respondent and that it did not include any of the Veterans' Administration reports here in question. The Board's adverse decision was rendered on a record containing only evidence of the type which the respondent and the court of appeals assert may be considered.

Section 302, while requiring the Review Board to give a hearing with respect to its initial review of the Retiring Board's decision, in no way requires the Review Board to grant a rehearing to the retired officer after it has, as here, once affirmed the Retiring Board's decision. That rehearing is granted as a matter of grace, and, as is true of other administrative bodies, is a matter

exclusively committed to administrative discretion. *I. C. C.* v. *Jersey City,* 322 U. S. 503, 514; *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535; *United States* v. *Northern Pacific Ry. Co.,* 288 U.S. 490, 494. Since the rehearing is discretionary and in no way required by the statute, it would seem that the Board can attach whatever reasonable and fair requirements it wishes; and a requirement that such pertinent evidence as official Veterans' Administration medical reports be considered is certainly reasonable. The result is, in this particular case, that even though the statute be read so as to require the exclusion of Veterans' Administration reports, that exclusion should pertain only to the first review authorized and required by statute, and should not be extended to affect the rehearing here involved, which was granted as a matter of grace by the Board.

III

Since the Review Board's construction of the statute is at least reasonable, its proceedings cannot be controlled by mandamus

A. The considerations set forth above show, at a minimum, that there is ample and reasonable basis for doubting the soundness of respondent's contention that Section 302(a) of the Servicemen's Readjustment Act required the Disability Review Board to blind itself to Veterans' Administration medical reports. Those considerations, which also led the Board to interpret Section 302(a) so as

to reject respondent's contention, take on even greater significance in a mandamus action, such as this. There is then brought into play the firmly-established rule that where an administrative duty "depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States,* 281 U.S. 206, 219; see *Decatur* v. *Paulding,* 14 Pet. 497, 515; *Hall* v. *Payne,* 254 U.S. 343, 347-348; *Ness* v. *Fisher,* 223 U.S. 683, 691-692; *Work* v. *Rives,* 267 U.S. 175, 177-178; *United States ex rel. Chicago Great Western Railroad Co.* v. *I.C.C.,* 294 U.S. 50, 61-3. This, of course, is merely one application of the traditional rule that decisions of administrative officers involving the exercise of discretion and judgment, and in so far as they are not unreasonable or plainly wrong, will not be set aside by process in the nature of mandamus. *Wilbur* v. *United States,* 281 U. S. 206; *Denby* v. *Berry,* 263 U.S. 29; *United States ex rel. Girard Trust Co.* v. *Helvering,* 301 U.S. 540; *Keim* v. *United States,* 177 U.S. 290, 292; *Hammond* v. *Hull, et al.,* 131 F. 2d 23 (C.A. D.C.), certiorari denied, 318 U.S. 777; *United States ex rel. Roughton* v. *Ickes,* 101 F. 2d 248 (C.A. D.C.). "Where there is discretion * * * even though its conclusion be disputable, is is impregnable to mandamus." *Alaska Smokeless Coal Co.* v. *Lane,* 250 U.S. 549, 555.

This rule that discretionary action on the part of executive officers acting within the scope of their statutory authority will not be controlled by the courts has particular force as applied to the military establishment. This Court has repeatedly refused to sanction judicial intrusion into the realm of ordinary military and naval administration. "To those in the military or naval service of the United States the military law is due process." *Reaves* v. *Ainsworth,* 219 U.S. 296, 304. In that case, where a former Army officer sought a writ of certiorari in the District of Columbia courts to review the proceedings of an Army promotion board finding him not qualified for promotion, and to annul an order made by the President discharging him from the Army, the proceedings were held to be not subject to review by the courts. This Court said (219 U.S., at 306):

> * * * The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. * * * If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embar-

rassment of such a right to the service, indeed the detriment of it, may be imagined.

See also *French* v. *Weeks*, 259 U.S. 326, 335-6; *Creary* v. *Weeks*, 259 U.S. 336, 344; *Denby* v. *Berry*, 263 U.S. 29, 33-4.

B. The foregoing rules are not changed by anything in the Administrative Procedure Act. Section 10 of that statute, setting forth the provisions for judicial review of adminisrative action, is the only provision which could conceivably apply here.[36] But the terms and history of the Act make it clear that Section 10 was designed in general to restate existing law (see the Government's brief in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, No. 42, this Term, pp. 59-68; 90-91), and that there was no intention to change the rules governing judicial review in such a traditional form of proceeding as mandamus. House

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[36]Application of other provisions of the Act would furnish respondent no comfort. For example, Section 7(c), which deals with the admissibility of evidence in hearings, would require rejection of respondent's contention that Veterans' Administration reports may not be considered by the Review Boards. For Section 7(c) provides that "*any* oral or documentary evidence may be received." (Italics supplied.) That section also provides that the agencies shall exclude irrelevant, immaterial or unduly repetitious evidence. But there is no doubt that the Veterans' Administration reports here involved are material, are relevant and are in no way repetitious. Indeed, the only possible means of explaining respondent's objection to their consideration is that they are material to the decision required to be made by the Review Board.

Hearings Before Committee on Judiciary on H. R. 184 etc., 79th Cong., 1st sess., pp. 37-38 (Sen. Doc. 248, 79th Cong., 2d sess., pp. 83-84); Sen. Rep. No. 752, 79th Cong., 1st sess., pp. 38, 43, 44; (Sen. Doc. 248, 79th Cong., 2d sess., pp. 224, 229, 230). Section 10 was not designed to disturb the settled rule, discussed *supra*, pp. 50-53, which limits mandamus to cases of ministerial action, clear abuse of discretion, or plain misreading of a statute. Since *Decatur* v. *Paulding*, 14 Pet. 497, decided in 1840, this Court has consistently restricted mandamus to such cases. Certainly, if Congress in passing the Administrative Procedure Act had intended to alter this historical principle and to invest the Federal courts with the power of judicial review over the normal incidents of military and naval administration, apt language could easily have been fashioned, would certainly have been used, and the change would have been mentioned. The fact that neither the rule as to the scope of relief in mandamus nor that as to non-reviewability of action pertaining to military and naval administration was referred to, seems to us to be convincing proof that no change in either was intended to be made.

IV

Respondent failed to exhaust his administrative remedy

In any case, the decision of the court of appeals violates the well-settled rule that there must be an

exhaustion of administrative remedies before recourse may be had to the courts. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Federal Power Commission* v. *Arkansas Power Co.*, 330 U.S. 802; *S. E. C.* v. *Otis and Co.*, 338 U.S. 843.

The respondent has been accorded a hearing by the Review Board, as a result of which the findings of the retiring board were affirmed in part and reversed in part. The rehearing which the Review Board later granted has never been held because, although scheduled on three occasions, it has been postponed twice upon the respondent's request, and a third time because of this suit. The Veterans' Administration reports in question have never been considered by the Review Board or any action taken thereon,[37] and, until the Review Board has acted and denied the claim, there is no showing by the respondent of any injury. Only by resorting to speculation and conjecture may an adverse decision be anticipated. For aught that appears, these additional documents may constitute the very evidence needed by the Review Board, on rehearing, to reverse completely the findings of the retiring board and grant respondent full retirement privileges and any other benefits which may

[37] As shown above (pp. 4-5, 49), respondent admits that on his first hearing the Review Board did not consider, or have before it, the Veterans' Administration reports.

accrue from such changed findings — in which event he would have no cause to complain. This is the very situation contemplated by the exhaustion rule and the reason for its establishment. The premature interference with the administrative process allowed by the court below can be avoided only by requiring respondent to exhaust the remedies afforded to him before the Review Board.

The exhaustion principle should be applied regardless of whether or not respondent may be able to secure judicial review of the merits of an adverse decision by the Board, finally approved.[38] Cf. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 544-5. Even if a review on the merits of the

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[38] Like Section 302, here involved, Rev. Stat. 1250, 10 U.S.C. 965, provides that the proceedings and decision of Army retiring boards "shall be transmitted to the Secretary of War, and shall be laid by him before the President for his approval or disapproval and orders in the case." Since 1861, the War and Army Departments have consistently followed the practice of not actually transmitting the proceedings and decision of retiring boards or Disability Review Boards to the President, and the Secretary of War (or of the Army) has acted in his stead, usually issuing his order "by direction of the President"—though no express delegation of authority from the President has been found. There are now pending in the Court of Appeals for the District of Columbia Circuit two cases raising the question whether this practice has been valid or whether the President should have personally passed upon each determination. *Updegraff* v. *Pace*, C.A.D.C., No. 10546; *Almour* v. *Pace*, C.A.D.C., No. 10295. Cf. Pub. L. 673, 81st Cong., 2d Sess., approved August 8, 1950 ("An Act to authorize the President to provide for the performance of certain functions of the President by other officers of the Government, and for other purposes").

Board's decision would not then be available, as the court below suggests (R. 26), we believe that if respondent would now be entitled—the exhaustion doctrine aside—to mandamus the Board not to consider the Veterans' Administration reports, he may, after an adverse decision, secure a judicial directive requiring the Board to reopen its proceedings and reconsider the matter apart from the excluded data. Judicial intervention at that stage would be preferable to intervention at the present time, when respondent cannot show that he has been hurt. Cf. *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294; 64 Harv. L. Rev. 490, 491 (Jan. 1951).

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is erroneous and should be reversed.

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FEBRUARY, 1951.

☆ U. S. Government Printing Office: J927360/309